In the

Supreme Court of the United States

October Term, 1978

No. 78-312

PAUL SKIDMORE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

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CITATIONS

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The petitioner Paul Skidmore respectfully prays that a writ of certiorari issue to review the opinion and judgment rendered in this proceeding on February 10, 1978, by the Appellate Court of Illinois, Third District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third District, rendered on February 10, 1978, is reported at 14 Ill. Dec. 527, 372 N.E. 2d 723 (1978). It is reprinted in the appendix hereto.

The Supreme Court of Illinois, in denying a petition for review, wrote no opinion.

JURISDICTION

Following a non-jury trial in the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, the petitioner was found guilty of violating an Illinois statute (Ill. Rev. Stat. 1975, Ch. 13, par. 15) that makes it unlawful for any lay person not an attorney at law to solicit "for money, fee, commission, or other remuneration directly or indirectly in any manner whatsoever," any demand or claim for personal injuries or for death. On June 13, 1977, the petitioner was sentenced to imprisonment for three months and fined $500.

The Appellate Court of Illinois, Third District, affirmed the judgment of conviction on February 10, 1978. Thereafter, on May 26, 1978, the Supreme Court of Illinois denied without opinion a timely petition for leave to appeal. And on June 28, 1978, the Supreme Court of Illinois denied a timely motion for reconsideration of the order denying the petition for leave to appeal. Those orders are reproduced in the appendix hereto. This petition for certiorari is being filed less than 90 days from the date of the entry of the order denying the motion for reconsideration. See App. 12, *infra.*

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment proscribes a criminal conviction under an Illinois anti-solicitation statute, which outlaws a non-lawyer's solicitation of personal injury claims for any kind of direct or indirect remuneration, where (a) there was no relevant evidence that proved the critical element of remuneration

beyond a reasonable doubt, and (b) the conviction rested upon an unsupportable inference or conjecture that the defendant was soliciting for a remuneration.

2. Whether a non-lawyer's right of free speech under the First Amendment is violated by a criminal conviction, under an Illinois anti-solicitation statute that deals only with solicitation for some kind of direct or indirect remuneration, where there is no relevant evidence of such remuneration and where there is no evidence whatever (a) that the defendant had any financial, investigative or other relationship with the lawyer whose services were solicited, or with any other lawyer, or (b) that the lawyer whose services were solicited authorized, approved or was even aware that the defendant was engaged in such solicitation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law . . . abridging the freedom of speech . . .

United States Constitution, Fourteenth Amendment, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Illinois Revised Statutes 1975, Chapter 13, paragraph 15:

> It shall be unlawful for any person not an attorney at law to solicit for money, fee, commission, or other remuneration directly or indirectly in any manner whatsoever, any demand or claim for personal injuries or for death for the purpose of having an action brought thereon, or for the purpose of settling the same.

STATEMENT OF THE CASE

This case, which appears to be the first to arise under the Illinois anti-solicitation statute, is premised upon a rather bizarre set of facts, all of which are uncontested. In large part, petitioner's acts of solicitation occurred in the context of a trap set by the local State's Attorney's office, and virtually all of the relevant statements by and to the petitioner were recorded by a secreted court reporter without petitioner's knowledge or consent.

A. The relevant facts

(1) *October 15, 1976.* A nine-year-old son of a Mrs. Judith Hunter was seriously injured when struck by an automobile in front of his home in Joliet, Illinois. Tr. 16.

(2) *October 17, 1976.* Petitioner, an experienced private investigator, phoned the Hunter home and identified himself as an individual by name of Harold Stevens. He told the Hunters that he had heard from a mutual friend, one Saltzman, about their son's accident and that the Hunters might need legal advice and help; he left a phone number to call if they were interested in such legal assistance. Tr. 17-23.

(3) *November 17, 1976.* A month later, Mrs. Hunter received another phone call from petitioner, who again identified himself as Harold Stevens. When asked if she had thought about hiring someone as a lawyer, Mrs. Stevens replied that she was still thinking about it but that her husband was out of town. She then asked petitioner to come to her home on November 19, and petitioner agreed to do so. Immediately after this call, Mrs. Hunter reported the matter to an attorney in Joliet; thereafter she was called by an individual from the State's Attorney's office. Arrangements were then apparently made to set a trap for petitioner upon his scheduled visit to the Hunters' home on November 19. Tr. 23-27.

(4) *November 19, 1976.* At about 6 p.m., an investigator (a Mr. Hjemvick) and a court reporter, both from the office of the State's Attorney, arrived at the Hunters' home. Under the prearranged trap, Hjemvick was to pose as Chuck Hunter (Mrs. Hunter's husband), and the reporter was to remain hidden in a nearby room and to transcribe all the conversations that he heard.

Petitioner arrived at the Hunters' home on schedule at 7 p.m. Throughout the meeting, which lasted about one or one and one-half hours, Hjemvick assumed the role of Mrs. Hunter's husband, petitioner continued to pose as one Harold Stevens, while Mrs. Hunter played herself. The entire conversation was transcribed by the reporter, without petitioner's knowledge or consent, and was subsequently introduced as an exhibit at petitioner's trial. Tr. 105-171.

Often with the encouragement of the other two parties, petitioner discussed the legal situation created by the accident, including possible insurance claims and a suit against the driver of the automobile that struck the Hunter boy. Mrs. Hunter and Hjemvick portrayed innocence of their rights and reluctance to pursue any legal remedies. In the midst of these conversations, the following critical colloquys took place:

MR. HJEMVICK: The money to pay for this –

MR. STEVENS: Pay for what?

MR. HJEMVICK: To pursue the liability.

MR. STEVENS: Doesn't cost you a dime. Not five cents. Doesn't cost you five cents.

MR. HJEMVICK: Probably one of the reasons we can't – how are we going to pay for it?

MR. STEVENS: You can obtain any attorney you want

or at least any attorney that I know of that is practicing the injury claim field would represent you and give it to you in writing, as we do, no charge of any kind if no money is collected. There is just no charge.

MR. HJEMVICK: Costs us nothing? Nothing at all?

MR. STEVENS: You are no worse off than you already are. You have already got the injury in the accident and having an attorney represent you is an effort to try to get some money out of it, and the attorney gives it to you in writing, that he doesn't charge you a dime, you can't get hurt anymore.

MR. HJEMVICK: So, if you lose, then you pay nothing?

MR. STEVENS: Nothing.

MR. HJEMVICK: Then what happens if you win?

MR. STEVENS: Then if we are successful and then the fee that we are extracting for services under those circumstances would be a fee of one third of whatever the gross collection might amount to. Now, I don't know what limits this fellow has on his car . . . .

MRS. HUNTER: No, you said we don't know what he has. Does that mean –

MR. HJEMVICK: What happens if he has only ten and twenty?

MR. STEVENS: Then that's all you get.

MR. HJEMVICK: If you get ten?

MR. STEVENS: We take one-third and – three thousand plus. Without an attorney, you get nothing. (Tr. 136-137).

* * * * * * *

MR. HJEMVICK: If we go into this thing and we pursue, will you be representing us then?

MR. STEVENS: Our office will. I personally, as a person, may or may not be on the case. It's impossible for me at this time to predict just which one of our members –

MR. HJEMVICK: How many lawyers do you have?

MR. STEVENS: Five or six.

MR. HJEMVICK: You don't think you'll be the lawyer that handles it?

MR. STEVENS: I will be handling part of it from time to time. But there is not one man in the office that isn't as good as the next one. (Tr. 139).

* * * * * * *

MR. HJEMVICK: I would kind of like to talk it over. I will be honest with you, a friend of mine had a lawyer that was real good with him. When I told him, he said he would call and he recommended him. And I just don't know what to do. I want to do what is best for Jimmy.

MR. STEVENS: You don't have to decide on who you want . . . There are good lawyers in Joliet. I can't knock them. I don't know any of them and I don't want to. We are friendly competitors. I don't say they are bad.

MRS. HUNTER: Is your law office located right downtown in Chicago?

MR. STEVENS: Little bit, 134 N. LaSalle, corner.

MR. HJEMVICK: We will talk the thing over and decide exactly what we are going to do. I don't know – just –

MR. STEVENS: It's your right. Do whatever you want and obtain anyone you wish. If it can't be, then get somebody else. But don't drag your feet. (Tr. 156).

Petitioner had brought to this November 19 meeting a copy of the police report about the accident; and he also

supplied Hjemvick with an investigator's business card bearing the name of Harold Stevens. Tr. 75. Pretending not to be ready to employ a lawyer, Hjemvick and Mrs. Hunter terminated the meeting with a promise to call the Harold Stevens office if they decided to retain a lawyer. Tr. 168-169. Petitioner reiterated that a decision should not be delayed and that he would not feel "mistreated" if some other office were retained. Tr. 170.

(5) *November 29, 1976.* Hjemvick, again posing as Chuck Hunter, phoned petitioner and asked that he appear at the Hunter's home on the afternoon of November 29. Petitioner again assumed the role of Harold Stevens, and Hjemvick repeated his impersonation of Chuck Hunter. At this meeting, Hjemvick indicated that he and Mrs. Hunter had decided to retain the Stevens office because "you did take the time and interest." Tr. 179. Petitioner then secured from them two signed documents: (a) a release of medical records, and (b) an attorney-client retainer agreement, which had the name of attorney Dale Broeder written on it. Tr. 81-82. Hjemvick, however, signed these documents using his true name, Sigurd Hjemvick, rather than his assumed name, Chuck Hunter. And at this point, Hjemvick orally revealed himself to petitioner as "an investigator for the State's Attorney's office and you are under arrest." Tr. 187. Petitioner acknowledged the entrapment and the arrest with but one word: "Okay." Tr. 187.

At the subsequent trial the proof showed that there was no member of the Illinois bar bearing the name Harold Stevens. But the prosecution made no effort whatever to identify or produce Dale Broeder, the attorney whose name had been written on the retainer agreement, although petitioner identified Broeder's office address in Chicago. Tr. 186. There was certainly no evidence that Broeder was even aware of, let alone that he authorized or approved,

petitioner's solicitation of the Hunter family claim. Nor was there any evidence that petitioner had any financial, investigative or other connection with Broeder, or that petitioner had any agreement or understanding with Broeder or any other lawyer to solicit any personal injury claims or to obtain any kind of direct or indirect renumeration, fee or profit for soliciting the Hunter family claim or any other claim of this nature. For aught that appears, petitioner solicited this particular claim quite gratuitously, seemingly out of friendship or kindness toward Broeder.

B. The rulings below

Petitioner, having offered no evidence at the trial, moved for a finding of not guilty, arguing that there had been no showing whatever that the solicitation had been "for money or remuneration" as the statute required. Tr. 195. But the trial court found petitioner guilty of solicitation of legal business as charged, making no finding or comment as to the remuneration requirement. Tr. 198.

Petitioner renewed his contention as to remuneration in a motion for a new trial. The prosecutor's only answer was that "circumstantially at least, we believe that this defendant was in fact doing so [soliciting for remuneration]" since "I can't imagine the defendant being there for any other reason." Supp. Tr. 6. The trial judge denied the new trial motion without comment.

This argument was pursued by petitioner on his appeal to the Appellate Court, urging that federal due process of law requires that the prosecution prove beyond a reasonable doubt every fact necessary to prove the crime charged. Appellant's Brief, p. 18. The State countered by asserting that petitioner had misread the statute and the legislative intent; and that if such proof as to remuneration were re-

quired it would be necessary to prove a conspiracy. The Appellate Court disagreed with petitioner's "interpretation of the foregoing [anti-solicitation] statute," App. 6, and held that the expectation of remuneration could be inferred from petitioner's use of the word "we" in speaking of a successful personal injury suit on a contingent fee basis. In other words, when petitioner stated to Hjemvick and Mrs. Hunter that "if we are successful and then the fee that we are extracting under those circumstances would be a fee of one-third of whatever that gross collection might amount to," Tr. 137, the Appellate Court drew the inference that petitioner "expected remuneration" out of this one-third contingency if legal proceedings resulted in a recovery for the Hunter family.

By virtue of the Appellate Court's interpretation and application of the Illinois anti-solicitation statute, which had never before been construed, petitioner raised two federal constitutional questions in his petition for leave to appeal to the Supreme Court of Illinois: (1) the renewed claim that federal due process requires that the crucial element of remuneration be proved beyond a reasonable doubt, and (2) the claim that, as construed by the Appellate Court to eliminate the necessity of proving some form of solicitation beyond a reasonable doubt, the Illinois anti-solicitation statute has been interpreted and applied so as to violate petitioner's right of free speech under the First Amendment. These federal claims were ignored by the Supreme Court of Illinois in denying the petition for leave to appeal, though the denial obviously did not rest on any finding that the federal claims had not been properly and timely raised. These two federal constitutional claims were once again presented by the petitioner's motion for reconsideration, but once again the Supreme Court of Illinois acted without comment and simply denied the motion.

REASONS FOR GRANTING THE WRIT

The decision below has created two significant and novel constitutional problems, both of which are of such magnitude as to warrant plenary review by this Court.

1. *An important federal due process problem is raised by the Illinois court's reliance on an unsupportable inference and conjecture as to remuneration as a substitute for proof beyond a reasonable doubt of the critical element of remuneration.*

The Appellate Court's decision that a highly speculative inference may be substituted for proof of the critical remuneration element of the solicitation crime directly conflicts with the principle repeatedly enunciated by this Court "that a [state court] conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violates due process" under the Fourteenth Amendment. *Vachon v. New Hampshire,* 414 U.S. 478, 480 (1974); and see *Thompson v. Louisville,* 362 U.S. 199, 206 (1960); *Adderley v. Florida,* 385 U.S. 39, 44 (1966). And the failure of the Illinois court to insist that this critical element of remuneration be proved beyond a reasonable doubt contradicts the many decisions of this Court holding that such proof is constitutionally required. *In re Winship,* 397 U.S. 358, 362 (1970), and cases cited; *Mullaney v. Wilbur,* 421 U.S. 684, 685 (1975); *Holland v. United States,* 348 U.S. 121, 138 (1954).

There are two factors in this case that make these conflicts manifest: (1) the Illinois anti-soliciation statute criminalizes solicitation by a non-lawyer only if he solicits for some form of remuneration, as is typically the case in an

"ambulance chasing" operation;[1] (2) there is no evidence whatever in this record that this petitioner did receive or anticipate any kind of remuneration from an identifiable lawyer for his solicitation of the Hunter family claim. There was no evidence that petitioner had any kind of remunerative relationship with any lawyer involving the solicitation of personal injury claims; nor was there any evidence that any lawyer authorized, approved or even knew of petitioner's solicitation activities.

This Court cannot hope to review every state court conviction where such a complete absence of critically necessary evidence is alleged. But review is here justified by the opportunity afforded this Court to explore a new dimension to these settled constitutional principles, i.e., the extent to which a judicial inference, particularly one that is highly questionable in nature, is capable of providing proof beyond a reasonable doubt that the essential element of the crime was committed.

In the past, the Court has dealt with particular factual situations without attempting to formulate any general guidelines for determining whether or when the constitutionally necessary proof can be supplied by an inference. In *Thompson,* 362 U.S. at 205, the Court simply concluded that certain testimony provided "no semblance of evidence

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[1] The Appellate Court below did not and could not deny that remuneration is the very essence of the solicitation crime under this statute. Solicitation is punishable only if the non-lawyer solicits "for money, fee, commission, or other remuneration directly or indirectly in any manner whatsoever." The court obviously felt compelled to find some basis for satisfying this critical statutory predicate, albeit by way of an inference from petitioner's general reference to attorney's contingent fee contracts in personal injury situations.

from which any person could reasonably infer" the crucial element of the crime involved. In *Garner v. Louisiana,* 368 U.S. 157, 171-172 (1961), the Court noted that a certain "general statement" by a witness was insufficient proof of the critical element. And in *Vachon,* 414 U.S. at 480, a particular concession by the defendant was found "in no way probative of the crucial element in the crime."

But it has not yet been made clear by this Court, at least in this context, whether an inference sought to be used as a substitute for direct proof must be, in Judge Frankel's terms (*United States v. Adams,* 293 F. Supp. 776, 784 (S.D.N.Y. 1968)),

> ". . . one sustained by substantially more than a preponderance of the evidence, [and] that the probability is far in excess of 50-50, that it is sufficient to warrant a reasonable man's being convinced 'to a moral certainty' of the correctness of the inference."

See also *Leary v. United States,* 395 U.S. 6, 36, n. 64 (1969) (citing Judge Frankel's statement); *Barnes v. United States,* 412 U.S. 837, 842-843 (1973).

Were this or a substantially similar standard to be used to test the inference of remuneration drawn by the Illinois court in this case, the inference could not pass constitutional muster. No judge or jury can say, with any degree of moral or other certainty, that it is more probable than not that petitioner was acknowledging that he would somehow profit from the contigent fee contract when he made a general reference to such contracts in the course of the solicitation. To wit:

(1) Petitioner's use of the editorial "we" in describing the lawyer's traditional contingent fee contract was not ut-

tered by a lawyer and was not reflective of how a non-lawyer might be expected to be compensated for soliciting the claim.[2] Petitioner used the word "we," moreover, only as a part of his representation that he was a person known as Harold Stevens; petitioner never was, or claimed to be, a lawyer who might be expected to share in a lawyer's contingent fee.

(2) The one-third contingency mentioned by petitioner obviously referred not to the non-lawyer's solicitation fee – which was the ultimate fact to be inferred – but to the lawyer's potential fee for having successfully pursued a personal injury claim.[3]

(3) Absent a special arrangement which was not here proved, any payment or remuneration that a non-lawyer might receive for having solicited such a claim would not normally be dependent upon a recovery on the claim or be chargeable to the attorney's fee arrangement with the client.

(4) Remuneration under these circumstances would normally stem from a provable relationship between the non-lawyer "runner" or "touter" and an identifiable lawyer who employs such a non-lawyer for "ambulance chasing"

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2 When "used in an editorial sense" the word "we" is "not indicative in any conclusive way" of any given legal relationship. *Smith v. Maine,* 260 N.Y.S. 409, 419 (1932).

3 The court below was confused by this argument that the one-third contingency relates only to the lawyer's fee if recovery is had. It described the argument as an "interpretation" of the statute and proceeded to disagree with it. App. 6. Actually, of course, it is but one of the arguments available to show the irrationality of the inference used by the court to prove that some kind of remuneration was in fact to be received by the petitioner for the solicitation.

solicitation purposes.[4] Here, of course, there was no evidence that any lawyer even knew about petitioner's solicitation activities, much less that any lawyer authorized or approved such activities and intended to provide petitioner with some form of remuneration.

As this Court noted in *Anderson v. United States,* 417 U.S. 211, 223, n. 12 (1974), "a claim that a conviction is based on a record lacking any evidence relevant to crucial elements of the offense is a claim with serious constitutional overtones." The seriousness of the claim in this case is augmented by the lack of any definitive standards for overcoming such an evidentiary void through the use of inferences, and by the seeming irrationality and speculativeness of the inference utilized by the Illinois court in this case. The grant of certiorari becomes most appropriate in such circumstances.

Certiorari becomes further appropriate by virtue of the fact that a majority of the States now have anti-solicitation statutes similar to the Illinois one in question, statutes that make criminal the solicitation of legal business by non-lawyers who are in turn remunerated by attorneys. Warren,

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4 ". . . the most frequently cited requirement [in ambulance chasing cases] is that some valuable inducement be given by the attorney to the solicitor, commonly called a 'touter' or 'runner.' The inducement may be a flat fee for each case solicited, a fee contingent upon the amount of the recovery, or a straight salary. There need be no express agreement concerning payment; it is enough that the inducement be in fact given before or after the case is closed. The inducement may be indirect, such as assisting the agent in the collection of his bills from the client solicited, or rendering free legal advice or service. The question of what constitutes valuable inducement presents difficulty in some cases." Note *Legal Ethics – Ambulance Chasing,* 30 N.Y.U. Law Rev. 182, 183 (1955).

Solicitation of Legal Services – A Crime, 22 Ohio State L. J. 691 (1961). The instant prosecution may well be the forerunner of a widespread crackdown on solicitation by non-lawyers. If so, it is important that the state courts be given guidance as to the types of evidence and inferences that are constitutionally permissible in proving the crime of solicitation for remuneration.

2. *An important and novel First Amendment free speech problem is raised if Illinois is permitted to convict a non-lawyer for solicitation without credible proof that he solicited for remuneration.*

The Appellate Court below has applied the Illinois anti-solicitation statute as if it had no remuneration predicate – or at least as if there were no constitutional requirement that the critical element of remuneration be proved beyond a reasonable doubt by direct proof or by credible inference. As a result, petitioner's conviction under this statute raises a substantial and novel question whether his right of free speech under the First Amendment has been invaded by the State. Does a layman, or a non-lawyer, have the constitutional right to solicit and secure legal business, on a voluntary and non-remunerative basis, as a token of friendship for an attorney friend?

This Court's decisions last May 30 in *Ohralik v. Ohio State Bar Assn.*, No. 76-1650, and *In re Primus,* No. 77-56, dealt of course not with laymen but with lawyers accused of violating the bar's disciplinary ban on in-person solicitation by attorneys. But those decisions, particularly *Ohralik,* gave renewed emphasis to the First Amendment implications of soliciting legal business on a free or non-commercial basis. The attorney's in-person solicitation in

Ohralik was held proscribable by Ohio precisely because it was proved, indeed conceded, that the solicitation was directed at the "procurement of remunerative employment" and securing "employment for precuniary gain" – "a subject only marginally affected with First Amendment concerns." Slip opinion, pp. 11-12, 16. And in *Primus,* where the attorney's solicitation occurred in an organizational context, First Amendment concerns were found to prevail because "This was not in-person solicitation for pecuniary gain." Slip opinion, p. 9.

Moreover, the *Ohralik* opinion perceived that one of the potentials for harm that justified Ohio's prophylactic ban on commercial solicitation by a lawyer lay in the fact that "the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." Slip opinion, p. 17. Or, as Mr. Justice Rehnquist's dissent in *Primus* put it (p. 6), "A State may rightly fear that members of its Bar have powers of persuasion not possessed by laymen." The implication seems clear that the State has no legitimate concern in banning solicitation by a non-lawyer, at least when he operates completely apart from any lawyer, since he is assumed not to be "a professional trained in the art of persuasion."

That implication may well be true, for there has never been any effective refutation of the principle long ago announced by the Kentucky court, *Chreste v. Commonwealth,* 171 Ky. 77, 98, 186 S.W. 919, 926 (1916), that "The friends, acquaintances and associates of an attorney have of course the unquestioned right to sound his praises and divert to him such clients as they can persuade in a legitimate way to engage his services." And in an earlier day, the Illinois Supreme Court once stated, *In re Mitgang,* 385 Ill. 311 52 N.E.2d 807, 815 (1944), that

"We are not so unfamiliar with legal business as to suppose that it drops casually into the office of lawyers in such a way that they share business in proportion to their number, but each attorney depends upon friends, associates and those who have engaged his legal services, and from any other number of circumstances showing his ability to handle law business. If obtaining business through friends were to be condemned it would extend over a large and complicated field, and might cause doubt as to the legitimacy of business coming through representing a client who through extensive business interests would have an opportunity to make many recommendations. For time out of mind the volume of the lawyer's business depends not only upon his own ability, but upon recommendations of friends and acquaintances."[5]

See also *In re McCullough*, 97 Utah 533, 95 P.2d 13 (1939).

Those state court decisions were rendered before the modern development by this Court of the commercial free speech doctrine. But they were expressing a universal notion that the voluntary solicitation of legal business by an attorney's friends and acquaintances, at least where the attorney plays no financial or other role in the solicitation process, is an "unquestioned" right of the friends and a necessary and common ingredient of a lawyer's acquisition of business. These state court cases may well have carved out the area where the First Amendment freedoms of the lawyer's friends and acquaintances should predominate. For

[5] The *Mitgang* opinion also stated that "The division line seems to be clear. A lawyer must . . . refrain from giving to employees, not lawyers, an inducement to seek out cases or to stir up litigation." 385 Ill. at 333, 52 N.E.2d at 817.

what overriding interest of the State would preclude the exercise of such freedoms, at least where the non-lawyer friend is not practicing law or acting as a paid agent of the lawyer?

This Court has never had occasion to assess the First Amendment validity of criminalizing the efforts of a lay friend to recommend and solicit for a lawyer, where the efforts are purely voluntary and without the knowledge and connivance of the lawyer. Cf. *McCloskey v. Tobin*, 252 U.S. 107 (1920), sustaining the constitutionality of a Texas statute, under the Equal Protection Clause of the Fourteenth Amendment, that outlawed a layman's effort to seek to obtain his own employment to prosecute or collect legal claims. Because the problem of solicitation is of growing concern to the entire legal profession and because this particular facet of the problem is reflective of a most common practice in the acquisition of legal business, review of the decision below is both necessary and appropriate.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appellate Court of Illinois – Third District

No. 77-405. People of the State of Illinois, Plaintiff-Appellee v. Paul Skidmore, Defendant-Appellant.

Feb. 10, 1978

MR. JUSTICE SCOTT delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Will County which found the defendant, Paul Skidmore, guilty of violating Ill. Rev. Stat. 1975, ch. 13, par. 15, which prohibits an individual, not a licensed attorney, from soliciting legal business for a money fee or other remuneration. The trial court sentenced the defendant to a term of three months imprisonment and further imposed a fine in the sum of $500.

The defendant was tried by a bench trial and the evidence disclosed that a nine year old son of Judith Hunter was struck by an automobile on October 15, 1976. Subsequently, on October 17, 1976, Mrs. Hunter received a phone call at her home. The voice was that of a male whom she later met at her home on November 19, 1976. During the telephone call the caller identified himself as Harold Stevens, an attorney from Chicago, and stated that he had knowledge of her son's accident and that he felt that legal action might be needed. The caller, later identified as the defendant, during the initial phone call also talked to Mrs. Hunter's husband to whom he gave a telephone number.

On November 17, 1976, Mrs. Hunter received another call from the defendant, who still identified himself as Mr. Stevens. She was asked if she had thought about hiring him as a lawyer and replied that she was still thinking about it but that her husband was out of town and she requested the caller to come to her home on November 19, 1976. The caller, being the defendant, agreed to do so.

After this call Mrs. Hunter called an attorney in Joliet and she was thereafter called by an individual from the

State's Attorney's office. On November 19, 1976, at approximately 6:00 P.M. Mr. Hjemvick, an investigator, and a court reporter, both from the State's Attorney's office, came to Mrs. Hunter's home. Mr. Hjemvick at this meeting and a subsequent meeting portrayed Mrs. Hunter's husband. During this meeting the defendant said that there was a possibility of suing the driver of the motor vehicle which struck her son. He also brought with him a copy of a police report which was about the son's accident and provided Mrs. Hunter with a business card bearing the name Harold Stevens. This particular meeting lasted for approximately one or one and one-half hours during which time the court reporter, Mr. Rydman, was located two rooms away and was transcribing the conversation between the parties.

Mrs. Hunter and Mr. Hjemvick, who portrayed her husband, did not agree to legal action during the first meeting with the defendant so he again came to the Hunter home on November 29, 1976, at approximately 1:30 P.M. The scenario was the same as at the previous meeting. This time the defendant, alias Harold Stevens, obtained a release of medical records, said release being signed by Hjemvick, and further obtained authorization to commence legal action.

A further recitation of the facts as adduced by the testimony and evidence during the course of defendant's trial will be set forth as they become pertinent to the issues presented for determination by this court.

The first issue presented is the defendant's contention that the trial court erred in admitting into evidence two typewritten transcripts of conversations with the accused where the court reporter testified that the transcriptions were not accurate and complete.

Addressing ourselves to this issue the record discloses that on direct examination the court reporter testified that the transcripts of the meeting on the 19th and 29th of November were a true and accurate record of the conversations which ensued at those meetings. On cross examination the witness testified that the transcripts were not true and accurate because of interruptions resulting in two people attempting to talk at the same time.

The defendant labels the two transcripts as past recollections recorded, which if they are in fact such, would constitute an exception to the hearsay rule. In order to be admissible as an exception to the hearsay rule there must be present four essential elements:

> "(1) (T)he witness must have had first hand knowledge of the event
>
> (2) the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it,
>
> (3) the witness must lack a present recollection of the event, and
>
> (4) the witness must vouch for the accuracy of the written memorandum." (McCormick on Evidence, Sec. 299, p. 712, 2d Ed. 1972.)

The defendant contends only that the last element is absent, since the court reporter testified that the transcripts were not true and accurate because of interruptions among those being recorded when two people attempted to talk at the same time.

The trial judge in admitting the transcripts made certain remarks which we deem to be pertinent and which are as follows:

"The Court: Well of course my notion of it is that that is true (referring to interruptions destroying the transcript accuracy) even if you are just going to have a witness testifying as to what he recalls, the chances are he wouldn't remember the interruptions any way so he couldn't tell you that from memory, besides that it happens frequently in the trial of cases and yet the record goes up on appeal time after time and I'm sure that there are very few court reporters which can take down what two people are saying simultaneously. The objection of the defendant is overruled."

As we interpret the trial judge's remarks he was recognizing that it is difficult if not well nigh impossible to obtain a perfect transcript or recordation of testimony or conversations in every instance. The trial judge was in effect saying that the transcripts in substance, with the exception of inaccuracies resulting from interruptions, reflected the conversations of the parties present at the two meetings in the Hunter home. While we know of no precedental case supporting the admissibility into evidence of transcripts which contain minor inaccuracies yet are substantially accurate as to all substantive matters, we nevertheless agree with the trial judge's remarks and ruling. To hold otherwise would be to flaunt common sense and make it virtually impossible to have a valid transcript of any clandestine or illegal transaction.

We note that the defendant in urging error in regard to the admissibility of the transcript relies heavily on the case of *People* v. *Munoz* (1975), 31 Ill. App. 3d 689, 335 N.E. 2d 35. In *Munoz* the question presented was the admissibility into evidence of an "incident book entry" made by an aide at a State hospital. The reviewing court held that such entry did not meet the requirements of a past recollection recorded and therefore qualify as an exception to the hearsay rule. With the ruling in *Munoz* we agree

because it is evident that all four of the required elements which we have previously itemized were absent.

When a proper authentication has been made to establish a past recollection recorded and therefore enables a record to be admitted into evidence, the record may be so admitted and be read into evidence or testified to. See *People* v. *Jenkins* (1973), 10 Ill. App. 3d 166, 294 N.E. 2d 24; *Wilson* v. *Parker* (1971), 132 Ill. App. 2d 5, 269 N.E. 2d 523; *People* v. *Greenspawn* (1931), 346 Ill. 484, 179 N.E. 98. It should be noted in the instant case that counsel for the defendant not only failed to cross examine any of the participants at the two meetings in the Hunter home regarding statements in or possible omissions in the transcript made of the conversations during such meetings, but after the same were admitted into evidence indicated to the court a willingness to waive a reading of the transcripts. We are well aware of the fundamental rule that the prosecution must prove a defendant guilty; however, if the defendant had knowledge of damaging inaccuracies in transcripts introduced into evidence he may by cross examination of witnesses call to the court's attention such inaccuracies. We find no error in the trial court's admission of the two transcripts into evidence.

Secondly, the defendant contends that his conviction cannot stand because there was no evidence adduced which showed that his solicitation was for remuneration.

The record discloses the following conversation between the defendant and Mr. Hjemvick, who was posing as Mrs. Hunter's husband:

"Mr. Hjemvick: So, if you lose, then you pay nothing?
Mr. Stevens: Nothing.

Mr. Hjemvick: Then what happens if you win?
Mr. Stevens: Then if we are successful and then the fee that we are extracting for services under those circumstances would be a fee of one-third of whatever that gross collection might amount to * * *"

The defendant asserts that the above colloquy makes it clear that only if retained and only if successful the attorney would receive one-third of the gross recovery for services rendered. The defendant apparently concedes a solicitation but argues that the remuneration to be received was not for solicitation but for recovery of damages. The statute which the defendant was charged with violating reads as follows:

"15. Par. 1. Prohibition. It shall be unlawful for any person not an attorney at law to solicit for money, fee, commission, or other remuneration directly or indirectly in any manner whatsoever, any demand or claim for personal injuries or for death for the purpose of having an action brought thereon, or for the purpose of settling the same." (Ill. Rev. Stat. 1975, ch. 13, par. 15.)

We do not agree with the defendant's interpretation of the foregoing statute. It is clear to this court that the defendant was soliciting legal business, to-wit, a personal injury action. For obtaining that business it is further clear from the use of the word "we" that he expected remuneration if the legal proceedings resulted in a recovery for the Hunter family. That the possible remuneration that the defendant was to receive was based upon a contingency in our opinion does not alter the fact that he was soliciting for a remuneration. The handling of personal injury suits on a contingent fee basis has long been an accepted practice in the legal system of our state. That ultimately he would be rewarded for his solicitation if the action was successful by parties other than himself does not

serve to remove the defendant's activities from the scope of the statute, since it specifically provides that the fee, commission or other remuneration can be received either directly or indirectly and such action still constitutes a violation. We believe that the defendant's argument that there was no evidence to support a finding that his solicitation was for remuneration is at the best a tenuous one and without merit.

The defendant next contends that the State did not properly prove that he was not listed on the Master Roll of Attorneys on file with the clerk of the supreme court.

An element of the offense of solicitation of legal business is that the offender is not an attorney at law. In order to sustain this element the State called as a witness John William Stephenson, who was an investigator with the Attorney Registration and Disciplinary Commission of the State of Illinois. This witness testified that after conducting a search of attorneys licensed to practice in Illinois the name of the defendant, to-wit, Paul Skidmore, or the alias used by the defendant, namely Harry Stevens, was not listed.

The defendant argues that this method of proof is not proper since the controlling list of attorneys who are licensed to practice in our state is a master roll filed in the office of the clerk of the supreme court. We note from the record that the witness Stephenson testified that the Registration and Disciplinary Commission maintained a master roll of all attorneys authorized to practice law in Illinois, and that the roll is identical to the one kept in Springfield with the clerk of the supreme court. The witness further testified that there is in existence on microfilm another list of attorneys licensed to practice in Illinois or who were ever licensed to practice in our state. The witnesses testi-

fied that after checking the microfilm list there was never a Paul Skidmore licensed to practice law in Illinois.

The defendant asserts that the records filed with the clerk of the supreme court should have been used to determine whether or not the defendant was licensed to practice law in Illinois and that such records or a certified copy of them should have been produced in court. We find no merit in this assertion since there was no evidence that the records maintained by the Attorney Registration and Disciplinary Commission were different than those kept by the clerk of the supreme court, but on the contrary the witness testified that the records were identical.

The defendant argues that the failure to produce in court the master roll of attorneys in the possession of the clerk of the supreme court was error in that it violates the hearsay rule. The thrust of the reason for prohibiting evidence or testimony because it constitutes hearsay is based upon the fact that such evidence precludes a party from conducting a cross-examination in regard to such evidence. In the instant case the record discloses that defendant's counsel did cross examine the witness Stephenson and we cannot conceive of any question other than those he asked that counsel could have propounded if the master roll had been produced in court.

The defendant in support of his contention that the master roll of attorneys should have been produced in court relies on the case of *United States* v. *Rohalla* (1966), 369 F. 2d 220 (CCA7). In *Rohalla* the reviewing court held that it was reversible error to permit the government to prove contents of printed record of automobile registration by oral testimony of witness in order to corroborate testimony of another witness. We immediately note that in *Rohalla* there was in fact records in esse while in the instant case the oral testimony of the witness proved a

negative, to-wit, that there was no individual named Paul Skidmore or Harry Stevens listed on any roll of attorneys licensed to practice law in the state of Illinois. We further note in *Rohalla* as did the reviewing court that the printed records pertaining to automobile registration were readily available to the government since the book in which they were contained was in the same building where the trial was being held. In the case before us the problem for the state was far more complex and difficult since it would have entailed bringing into court from Springfield or Chicago literally thousands of microfilms or records. Under the circumstances in the instant case we do not believe that there was a violation of the best evidence rule, however, should there have been such a violation, it was a technical one which in no way prejudiced the defendant and certainly would not constitute reversible error.

The defendant next urges as reversible error that the trial court did not afford him an opportunity to make a statement in his own behalf prior to imposing sentence. We are cognizant that our Criminal Code provides that after a determination of guilt a defendant shall have an opportunity during the sentencing hearing to speak in his own behalf. See Ill. Rev. Stat. 1975, ch. 38, par. 1005-4-1(a)(5). While the proper practice is to afford a defendant an opportunity to make a statement in his own behalf during a sentencing proceeding, failure to do so has not been deemed to be a fundamental defect of such magnitude as to require the reversal of a conviction and the voiding of the sentence imposed thereon. See *People* v. *Darling* (1977), 46 Ill. App. 3d 698, 361 N.E. 2d 121, and *People* v. *Spiler* (1975), 28 Ill. App. 3d 178, 328 N.E. 2d 201.

The defendant further argues that the sentence he received should be vacated because the trial court heard hearsay evidence of other crimes when sentence was im-

posed. From the record we find it to be true that the presentence report contained hearsay allegations of prior improper activities on the part of the defendant. The trial court refused to strike the objectionable material contained in the report but would accept it for what it was, to-wit, a purely hearsay statement.

In the instant case the defendant requested a sentence of conditional discharge. When a defendant requests probation the trial court assumes responsibility to public as well as defendant and the trial court is entitled to as broad a base of relevant information as is possible in making a decision whether or not to grant probation. See *People* v. *Kelly* (1976), 36 Ill. App. 3d 476, 344 N.E. 2d 50. Certainly the same rule should apply when a defendant requests a sentence of conditional discharge. On appeal it is to be assumed, absence any indication to the contrary, that the trial judge disregards all evidence except that which is competent and relevant to the determination being made. See *People* v. *Sawyer* (1971), 1 Ill. App. 3d 1096, 275 N.E. 2d 771; *People* v. *Grabowski* (1958), 12 Ill. 2d 462, 147 N.E. 2d 49. We find nothing in the record in the instant case which in any way indicates that the improper material contained in the presentencing report served to prejudice the trial judge against the defendant when sentence was imposed.

Lastly the defendant claims that the sentence imposed upon him is excessive. As we have previously stated, the defendant was fined in the sum of $500 and sentenced to a three month period of incarceration in the county jail. The fine levied against the defendant is the maximum allowable, however, he could have been sentenced to a term of imprisonment up to six months. See Ill. Rev. Stat. 1975, ch. 38, par. 1005-5-3(d), 1005-8-3(a)(2), and 1005-9-1(a)(3).

The defendant quarrels not with the fine in the sum of $500 but contends that the three month term of imprisonment is excessive.

At the outset we note that the defendant had previously been convicted of an income tax evasion charge. While the defendant's crime in the instant case was one free from violence, it was nevertheless the product of a devious and calculating mind and could have well injured and harmed innocent people. A crime need not be one of violence before it can be considered serious. See *People* v. *Waud* (1977),) ..... Ill. 2d ....., ... N.E. 2d ....., (No. 49055 filed by Ill. Sup. Ct. Nov. 1977).

While we may have imposed a different sentence that possibility is immaterial in that we are only to determine whether the trial court abused its discretion by imposing an excessive sentence. We can not and do not consider that the defendant received an excessive sentence.

For the reasons stated the judgment of the circuit court and the sentence imposed thereon is affirmed.

Affirmed.

BARRY, P.J., and STENGEL, J., concur.

Office of
Clerk of the Supreme Court
State of Illinois

Springfield
62706

Letter to Counsel: May 26, 1978

No. 50609 - People of the State of Illinois, respondent, vs. Paul Skidmore, petitioner. Leave to appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods

Clerk of the Supreme Court

Letter to Counsel: June 28, 1978

In re: People State of Illinois, respondent, vs. Paul Skidmore, petitioner. No. 50609.

The Supreme Court today made the following announcement concerning the above entitled cause:

> The motion by petitioner for reconsideration of the order denying petition for leave to appeal is denied.

Very truly yours,

/s/ Clell L. Woods

Clerk of the Supreme Court